

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1099

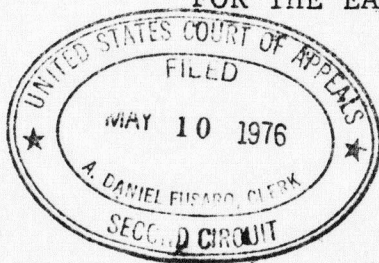
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
PHILIP ROSATI,
Defendant-Appellant.

B
Pog-S
Docket No. 77-1099

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
PHILIP ROSATI
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

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DOCKET - U.S. District Court
JUDGE/MAGISTRATE Assigned
MEANOR Mis
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x207 1
District Office
0719
vs. 76 CR 358-2
ROSATI, PHILIP
(LAST, FIRST, MIDDLE)
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76 358 2
Yr. Doc# Def

U.S. TITLE/SECTION
21-846,963,952(a)(1) Did conspire to import and
960(a)(1)841(a)(1) distribute marihuana
18-2

OFFENSES CHARGED

U.S. MAG.
CASE NO.

BAIL • RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☐ Pers. Recog.
☐ PSA
S 000
Date
☐ Bail Not Made
☐ Status Changed (See Docket)
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3rd Prty Cust
☐ Other

II. KEY DATES & INTERVALS

SUPERSEDING
COUNTS

ARREST or
U.S. Custody Began
Summons Served
First Appearance
INDICTMENT ☒
High Risk Date
Information ☐
5-24-76
Indict. Waived ☐
Superseding ☐
Indict/Info ☐
In Charging District
ARRAIGNMENT
5/28/76
1st Plea
Final Plea
TRIAL
Trial Set For 11/10/76
V. Dir. ☐
Trial Began 11/10/76
Trial Ended 11/17/76
Disposition of Charges
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On All Charges
☐ On Lesser * Offense(s)
☐ WOP: ☐ WP
☐ On Govern'ts Motion

MAGISTRATE
Search Warrant Issued
Summons Issued
Arrest Warrant Issued
COMPLAINT
OFFENSE (In Complaint)
DATE
INITIAL/NO.
INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION OR REMOVAL HEARING
Date Scheduled
Date Held
Tape Number
OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Edward Thompson, Jr.

* Show last names and suffix numbers of other defendants on same indictment/information:

COLBERT 1

DATE (DOCUMENT NO.) PROCEEDINGS EXCLUDABLE DELAY (a) (b) (c) (d)
5-24-76 Before BRAMWELL, J - Indictment filed
5-28-76 Before CHREIN, Mag - Case called. Deft & counsel present. Deft arraigned and pleaded not guilty. Motions due by 6-25-76 before Judge Neaheer, Deft released on \$10,000 personal recognizance bond. Deft released to custody of Pretrial Services to reside in halfway house and call pretrial services once a week.
6-25-76 Before COSTANTINO, J. - Case called. Oral motion to extend bail limits argued & denied.
6-28-76 Before NEAHER, J - case called - deft & counsel David Rudolph present - defts application for an extension of bail limits is argued and granted - deft permitted to travel to Calif. and to return to ED NY by July 5, 1976 on or before midnight - special condition of bail limits extension is that the deft report to the Pretrial Services of the Central Dist. of Calif. on a daily basis -case adjd to August 30, 1976 for trial at 10:am.
7-6-76 Notice of motion for leave to take deposition, ret 7-9-76 at 2 P.M. filed.

DATE	DOCUMENT NO.	IN PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
				Interval Section (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
7-13-76		Defts Memorandum of Law filed					
7/16/76		Govt's memorandum in opposition to Defts motion for permission to take foreign depositions. filed.					
7-30-76		Before NEAHER, J - Case called and Deft & counsel present - defts application to extend present bail limits to include California - granted on condition that deft report to the supervisor of the Pre Trial Service at the Central District of Calif. Case adjd to Nov. 10, 1976 for trial.					
7-14-76		Notice of motion filed to suppress evidence (ret. 11-10-76)					
9/27/76		Before NEAHER, J.- Case called. Deft not present. Counsel present. Case adjd to 10/12/76 at 10:00 a.m. for status report.					
9-28-76		Stenographers transcript filed dated July 16, 1976					
10/12/76		Before NEAHER, J.- Case called. Deft not present. Counsel for deft present. Case adjd to 11/10/76 at 10:00 a.m. for trial.					
11/10/76		Before NEAHER, J.- Case called. Deft & Counsel present. Defts motion to take deposition of Pakistani citizen - withdrawn. Defts motion to suppress argued and denied. Trial ordered and begun. Jurors selected and sworn. Trial continued to 11/11/76 at 10:00 a.m.			10/12/76 M		
11-11-76		Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Gov't opens. Deft waives opening statement. Trial continued 11-12-76 at 10:30 A.M.			11/10/76		
11-12-76		Voucher for expert serviees filed					
11-12-76		Before Neaheer J- case called As per telephone call atty reported ill - trial contd to Nov. 15, 1976.					
11-15-76		Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 11-16-76 at 10:00 A.M.					
11-16-76		Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft. moves for a judgment of Acquittal - denied. Trial continued to 11-17-76 at 10:00 A.M.					
11-17-76		Stenographer's Transcripts dated November 11, 1976 and November 15, 1976 filed.					
11-17-76		Before NEAHER, J - case called - deft & atty David Rudolf present-Jury resumes deliberations - Jury returns with a verdict of guilty/to counts 1, 2 & 3 - Jury discharged - Time for motions by deft extended to sentence date - Bail: \$10,000 P.R. Bond - contd with the condition that the deft report weekly to Probation Dept, in Central District of Calif. adjd without date for sentence - trial concluded.					
11/18/76		Stenographers transcript dated 11/17/76 filed.					
11/18/76		Voucher for compensation for expert services filed.					
12-1-76		Stenographer's Transcript dated November 16, 1976 filed.					
1-11-77		Voucher for Compensation for Expert Services filed.					
1-13-77		Stenographers transcript filed dated Nov 10, 1976					
4-8-77		two transcripts filed (one dated 9-27-76 and one dated 10-12-76)					

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

B

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

PHILIP ROSATI

76

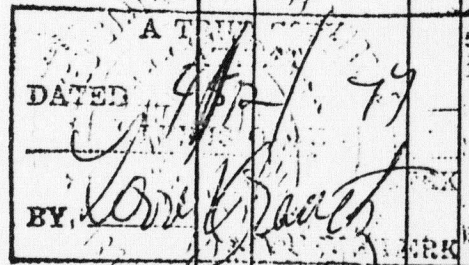
358

Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
2-18-77	Before NEAHER, J - case called - deft & counsel David Rudolf present - defts moves to set aside verdict and for a new trial - denied - deft is sentenced pursuant to 18:5010(b) to run concurrently with counts 1, 2 & 3. Deft informed of right to appeal - clerk directed to file Notice of appeal - CJA 23 filed - execution of sentence stayed pending appeal - bail contd on condition that the deft report to the Probation Dept. in Los Angeles, Calif.				
2-18-77	Judgment and commitment filed - certified copies to Marshal.				
2-18-77	Notice of appeal filed (without fee)				
2-18-77	Docket entries and duplicate of Notice of appeal mailed to the court of appeals.				
3.11.77	Order filed received from the Court of Appeals that the record be docketed on or before 4.12.77, in default of which the appeal shall be dismissed forthwith.				
3.22.77	Before Neaher, J.- Case Called. Deft. not present. Counsel present. Govt's. application to have defts' bail resinced or substantially increased - argued and granted. Deft's. bail revoked. Deft. remanded to the custody of the Attorney General to begin his commitment.				
4-7-77	Transcript filed dated 2-18-77				
4-8-77	two transcript filed (one dated 9-27-76 and one dated 10-12-76)				
4/12/77	Record on appeal cdrtified and hand delivered to the C of A by Joan Gill.				



RJD:BJF:ET:srt
F. 761,605

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76CR 358

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UNITED STATES OF AMERICA

I N D I C T M E N T

-against-

Criminal No.

BRAD MEYER COLBERT and
PHILIP ROSATI,

(T. 21, U.S.C., §§846, 963,
952(a), 960(a)(1), 841(a)(1)
and Title 18, U.S.C., §2)

Defendants.
----- x

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ MAY 24 1976 ★

THE GRAND JURY CHARGES:

COUNT ONE

TIME A.M.
P.M.

On or about and between April 1, 1976 and April 30, 1976, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants BRAD MEYER COLBERT and PHILIP ROSATI, and others known and unknown to the Grand Jury, knowingly and intentionally did combine, conspire, confederate and agree together and with each other to violate Sections 841(a)(1), 952(a), 960(a)(1) and 960(b)(2) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants knowingly and intentionally would import into the United States from places outside thereof a quantity of marihuana, in the form of hashish oil, a Schedule I controlled substance.

2. It was further a part of said conspiracy that the defendants knowingly and intentionally would possess with intent to distribute and distribute a quantity of marihuana, in the form of hashish oil, a Schedule I controlled substance.

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Eastern District of New York and elsewhere:

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O V E R T A C T S

1. On or about April 10, 1976, the defendants COLBERT and ROSATI, traveled together from John F. Kennedy International Airport, Queens, New York, to India.

2. On or about April 30, 1976, the defendants COLBERT and ROSATI traveled together from India to John F. Kennedy International Airport, Queens, New York.

3. On or about April 30, 1976, upon arrival at John F. Kennedy International Airport, Queens, New York, the defendant COLBERT had in his possession approximately two thousand (2,000) grams of marihuana, in the form of hashish oil.

(Title 21, United States Code, Sections 846 and 963.)

COUNT TWO

On or about the 30th day of April, 1976, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants BRAD MEYER COLBERT and PHILIP ROSATI, did knowingly and intentionally import into the United States from India approximately two thousand (2,000) grams of marihuana, in the form of hashish oil, a Schedule I controlled substance. (Title 21, United States Code, §952(a) and §960(a)(1), and Title 18, United States Code, §2.)

COUNT THREE

On or about the 30th day of April, 1976, within the Eastern District of New York, the defendants BRAD MEYER COLBERT and PHILIP ROSATI did knowingly and intentionally possess with intent to distribute approximately two thousand (2,000) grams of marihuana, in the form of hashish oil, a

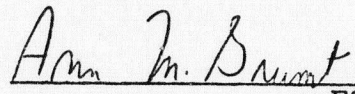
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Schedule I controlled substance. (Title 21, United States Code, §841 (a) (1), and Title 18, United States Code, §2.)

A TRUE BILL.



DAVID G. TRAGER
United States Attorney,
Eastern District of New York.



FOREMAN.

2 (The jury thereupon returned to the courtroom
3 at 3:55 O'clock p.m.)

4 THE COURT: Members of the jury, we are now
5 at the stage of the trial where you are about to under-
6 take your final function as Jurors. Your duty is a
7 serious and important one. In performing it you
8 actively share with the Court the responsibility of
9 administering justice according to law and the evidence
10 in the case.

11 Your oath as Jurors obliges you to discharge
12 this final task in an attitude of complete fairness
13 and impartiality and, as was emphasized by me when
14 you were selected as Jurors, without bias or prejudice
15 for or against the Government or the defendant as
16 parties to this controversy. The case is important
17 to the Government, since the enforcement of the
18 criminal laws is of prime importance to the welfare of
19 the community. Obviously it is equally important to the
20 defendant who is charged with a serious crime and
21 has the right to receive a fundamentally fair trial.
22 The community has an interest in that too.

23 Let me add, the fact that the Government is a
24 party entitles it to no greater consideration than
25 accorded to any other party to a litigation. By the

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1 same token it is entitled to no less consideration.
2 All parties, Government and individuals alike, stand
3 as equals before the bar of justice.
4

5 Your final role is to decide and pass upon the
6 fact issues in the case. You are the sole and exclusive
7 judges of the facts. You determine the weight of the
8 evidence. You appraise the credibility of the
9 witnesses. You draw the reasonable inference from the
10 evidence. You resolve such conflicts as there may be
11 in the evidence. I shall later refer to how you
12 determine credibility of witnesses.

13 My final function is to instruct you as to the
14 law. It is your duty to accept these instructions
15 as to the law and to apply them to the facts as you may
16 find them. With respect to any fact matter, it is
17 your recollection and yours alone that governs. As I
18 have already told you, anything that counsel, either
19 for the Government or the defense may have said with
20 respect to the matters in evidence, whether during the
21 trial, in a question, in an argument, or in summation
22 is not to be substituted for your own recollection
23 of the evidence, so too, anything the Court may have
24 said during the trial or may refer to during the
25 course of these instructions as to any matter in

1 evidence is not to be taken in lieu of your own
2 recollection.
3

4 There are certain principles of law which
5 apply in every criminal case and to which I made
6 reference and emphasized at the time of your selection
7 as jurors. I repeat them now. The indictment is
8 merely an accusation, a charge. It is not evidence
9 or proof of a defendant's guilt. The defendant on
10 trial has pleaded not guilty. Thus the Government
11 has the burden of proving the charges against him
12 beyond a reasonable doubt. The defendant does not
13 have to prove his innocence.

14 On the contrary he is presumed to be innocent
15 of the accusations contained in the indictment. This
16 presumption of innocence was in his favor at the
17 start of the trial, continued in his favor throughout
18 the trial, is in their favor even as I instruct you
19 now, and remains in his favor during the course of
20 your deliberations in the jury room. It is removed
21 only if and when you are satisfied that the Government
22 has sustained its burden of proving the defendant's
23 guilt beyond a reasonable doubt. The question that
24 naturally comes up is what is a reasonable doubt. The
25 words almost define themselves.

1
2 That there is a doubt founded in reason and
3 arising out of the evidence in the case or the lack
4 of evidence. It is a doubt which a reasonable person
5 has after carefully weighing all the evidence.

6 Reasonable doubt is a doubt which appeals to your
7 reason, your judgment, your common sense and your
8 experience. It is not caprice, whim, speculation,
9 conjecture or suspicion. It is not an excuse to
10 avoid the performance of an unpleasant duty. It is
11 not sympathy for a defendant.

12 If after a fair and impartial consideration of
13 all the evidence you can confidently and honestly say
14 you are not satisfied of the guilt of the defendant,
15 that you do not have an abiding conviction of his
16 guilt, in sum, if you have such a doubt as would cause
17 you as a prudent person to hesitate before acting in
18 matters of importance to yourselves, then you have a
19 reasonable doubt and in that circumstance it is your
20 duty to acquit.

21 On the other hand, if after such an impartial
22 and fair consideration of all the evidence you can
23 confidently and honestly say you do have an abiding
24 conviction of the defendant's guilt, such a conviction
25 as you would be willing to act upon in important and

1
2 weighty matters in the personal affairs of your own
3 life, then you have no reasonable doubt and under such
4 circumstances it is your duty to convict.

5 One final word on this subject: reasonable
6 doubt does not mean a positive certainty or beyond
7 all possible doubt. If that were the rule, few
8 persons, however guilty they might be would not be
9 convicted. It is practically impossible for a person
10 to be absolutely and completely convinced of any
11 controverted fact which by its nature is not susceptible
12 of mathematical certainty. In consequence, the law
13 in a criminal case is that it is sufficient if the
14 guilt of the defendant is established beyond a reason-
15 able doubt. Not beyond all possible doubt. I might
16 add further that the requirement of proof beyond a
17 reasonable doubt operates on the whole case and not
18 on the separate bits of evidence. Each individual item
19 of evidence need not be proven beyond a reasonable
20 doubt.

21 Now, let us turn to the charges against the
22 defendant on trial. First, I am going to read
23 Count 1 of the indictment which charges that:

24 "On or about and between April 1, 1976 and
25 April 30, 1976, both dates being approximate and

1 inclusive, within the Eastern District of New York
2 and elsewhere, BRAD MEYER COLBERT and the Defendant
3 PHILIP ROSATI, and others known and unknown to the
4 Grand Jury, knowingly and intentionally did combine,
5 conspire, confederate and agree together and with
6 each other to violate certain sections of what I will
7 call for short the Federal Drug Act.
8

9 "1. It was part of said conspiracy that the
10 defendants knowingly and intentionally would import
11 into the United States from places outside thereof
12 a quantity of marijuana, in the form of hashish oil,
13 a Schedule I controlled substance.

14 "2. It was further a part of said conspiracy
15 that the defendants knowingly and intentionally would
16 possess with intent to distribute and distribute a
17 quantity of marijuana in the form of hashish oil.

18 "In furtherance of said conspiracy and to effect
19 the objects thereof, the following overt acts were
20 committed in the Eastern District of New York and
21 elsewhere:

22 "1. On or about April 10, 1976, the defendants
23 COLBERT and ROSATI, traveled together from John F.
24 Kennedy International Airport, Queens, New York, to
25 India.

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2 "2. On or about April 30, 1976, Colbert and
3 the Defendant Rosati traveled together from India to
4 John F. Kennedy International Airport, Queens, New York.

5 "3. On or about April 30, 1976, upon arrival
6 at John F. Kennedy International Airport, Queens,
7 New York, the defendant Colbert had in his possession
8 approximately two thousand (2,000) grams of marijuana,
9 in the form of hashish oil."

10 Now, the defendant in Count 1 is charged with
11 conspiring to import quantities of a controlled
12 substance, namely hashish oil, in violation of certain
13 divisions of Title 21, United States Code. Those
14 provisions read in relevant part as follows:-- one of
15 them is known as Section 952. And it says:

16 "It shall be unlawful to import into the
17 Customs territory of the United States from anyplace
18 outside thereof (but within the United States)...
19 any controlled substance..."

20 Section 960 says:

21 "Any person who -- contrary to Section 952...
22 knowingly or intentionally imports... a controlled
23 substance... shall be punished as provided in Sub-
24 Section (b) of this section."

25 Now, the Congressional purpose expressed in

1 the Federal Drug Act, as I shall abbreviate it, was
2 to exercise Federal control in order to prevent traffic
3 in or improper use of drugs having a substantial and
4 detrimental affect on the health and general welfare
5 of the people of the United States.
6

7 Section 963 of the Drug Act, also referred to
8 in Count 1 of the indictment, reads in pertinent part
9 as follows:

10 "Any person who attempts or conspires to
11 commit any offense defined in this subchapter is
12 punishable by imprisonment or fine or both...."

13 The word "import" as used in the Drug Act
14 means any bringing in or introduction of a controlled
15 substance to this country.

16 The words, "Customs Territory of the United
17 States," simply means all the states, the District of
18 Columbia and Puerto Rico.

19 Four essential elements are required to be
20 proved by the Government beyond a reasonable doubt
21 in order to establish the offense of conspiring to
22 import a controlled substance into the United States
23 as charged in Count 1 of the indictment:

24 First: That the conspiracy described in the
25 indictment was knowingly and wilfully formed by two

1
2 or more persons, and was existing at or about the
3 time alleged;

4 Second: That the defendant whose guilt or
5 innocence you are considering knowingly and wilfully
6 became a member of the conspiracy;

7 Third: That the object of the conspiracy was
8 to commit an unlawful act, that is, bring into the
9 United States a substance prohibited by law; and

10 Fourth: That at least one of the persons
11 involved committed an overt act, that is, knowingly did
12 something in furtherance of the conspiracy.

13 The indictment charges that the conspiracy
14 began on or about April 1, 1976, and continued to
15 April 30, 1976. The exact dates are not critical,
16 if you find beyond a reasonable doubt that the
17 conspiracy charged existed at any time during that
18 period.

19 What is a conspiracy? A conspiracy is a
20 combination of two or more persons, by concerted
21 action, to accomplish some unlawful purpose, or to
22 accomplish some lawful purpose by unlawful means. So,
23 a conspiracy is a kind of "partnership in criminal
24 purposes", in which each member becomes the agent of
25 every other member. The gist of the offense is a

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2 combination or agreement to disobey, or to disregard
3 the law.

4 Here similarity of conduct among various persons,
5 and the fact that they may have associated with each
6 other, and may have assembled together and discussed
7 common aims and interests, does not necessarily establish
8 proof of the existence of a conspiracy.

9 However, the evidence in the case need not
10 show that the members entered into any express or formal
11 agreement, or that they directly, by words spoken or
12 in writing, stated between themselves what their object
13 or purpose was to be, or the details thereof, or the
14 means by which the object or purpose was to be
15 accomplished. What the evidence in the case must show
16 beyond a reasonable doubt, in order to establish proof
17 that a conspiracy existed, is that the members in
18 some way or manner, or through some contrivance,
19 positively or tacitly came to a mutual understanding
20 to try to accomplish a common and unlawful plan.

21 In this case, as I have told you, Count One of
22 the indictment charges a conspiracy was formed between
23 Brad Colbert, who has been named as a defendant in the
24 indictment but is not here on trial, and the defendant
25 Philip Rosati, who is on trial. A person cannot

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conspire with himself and therefore you cannot find the defendant on trial guilty unless you find beyond reasonable doubt that he participated in a conspiracy as charged with Brad Colbert.

In that connection, the fact that Colbert testified he pleaded guilty to Count One -- the conspiracy count -- may not be considered by you as proof of the existence of the conspiracy charged or that the defendant on trial was a member of it. A conspiracy comes to an end when all the alleged co-conspirators have been arrested. A statement made by one of them after the conspiracy is over is not binding upon any other person charged with membership. You are to give no weight whatsoever to Colbert's plea of guilty, either with respect to the existence of a conspiracy as alleged or the guilt of the defendant on trial.

Furthermore, as I have said, a person cannot conspire with himself, and therefore you cannot find the defendant guilty unless you find beyond a reasonable doubt that he did in fact participate in a conspiracy with Colbert based upon the evidence as to his statements and conduct. His statements and conduct, of course, may be proved by the testimony of

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2 other witnesses, such as Colbert.

3 This brings us to the second element, whether
4 the defendant on trial was or became a member of
5 the conspiracy charged in Count One may become a
6 member of a conspiracy without full knowledge of
7 all the details of the conspiracy. On the other
8 hand, a person who has no knowledge of a conspiracy,
9 but happens to act in a way which furthers some
10 object or purpose of the conspiracy, does not thereby
11 become a conspirator.

12 Before the jury may find that a defendant, or
13 any other person has become a member of a conspiracy,
14 the evidence in the case must show beyond a reasonable
15 doubt the conspiracy was knowingly formed and that the
16 defendant, or other person who is claimed to have been
17 a member, wilfully participated in the unlawful plan,
18 with the intent to advance or further some object or
19 purpose of the conspiracy.

20 Now, an act is done knowingly if done voluntarily
21 and intentionally, and not because of mistake or
22 accident, or other innocent reason.

23 To act or participate wilfully means to act
24 or participate voluntarily and intentionally, and with
25 specific intent to do something the law forbids, or

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2 with specific intent to fail to do something the
3 law requires to be done; that is to say, to act
4 or participate with the bad purpose either to disobey
5 or to disregard the law. So if a defendant, with
6 understanding of the unlawful character of a plan,
7 knowingly encourages, advises or assists, for the
8 purpose of furthering the undertaking or scheme, he
9 thereby becomes a wilfull participant -- a conspirator.

10 One who wilfully joins an existing conspiracy
11 is charged with the same responsibility as if he had
12 been one of the originators or instigators of the
13 conspiracy.

14 In determining whether a conspiracy existed,
15 you should consider the actions and declarations of
16 all of the alleged participants, in this case both
17 Covert and the defendant Rosati. However, in determining
18 whether the defendant on trial was a member of the
19 conspiracy, if any, you should consider only the
20 evidence on his acts and statements. He cannot be
21 bound by acts or declarations of Colbert until it is
22 established that a conspiracy existed, and that he,
23 the defendant on trial, was a member.

24 Whenever it appears beyond a reasonable doubt
25 from the evidence in the case that a conspiracy existed,

1
2 and that the defendant was a member, then any state-
3 ments thereafter knowingly made and the acts thereafter
4 knowingly done, by any other person likewise found to
5 be a member, may be considered by the jury as evidence
6 in the case as to the defendant on trial, even though
7 the statements and acts may have occurred in his
8 absence and without the knowledge of the defendant,
9 provided such statements and acts were knowingly made
10 and done during the continuance of such conspiracy,
11 and in furtherance of some object or purpose of the
12 conspiracy.

13 (Continued on next page)
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1 In your consideration of the evidence in this
2 case as to the offense of conspiracy charged, you
3 should first determine whether or not a conspiracy
4 existed, as alleged in the indictment. If you conclude
5 that it did, you should next determine whether or
6 not the defendant on trial wilfully became a member.
7

8 As I said, if it appears beyond a reasonable
9 doubt from the evidence in the case that the
10 conspiracy alleged was wilfully formed, and that the
11 defendant wilfully became a member of the conspiracy
12 either at its inception or afterwards, then there
13 may be a conviction even though the conspirators may
14 not have succeeded in accomplishing that common object
15 or purpose and in fact may have failed of so doing.

16 The extent of any defendant's participation,
17 moreover, is not determinative of his guilt or innocence.
18 A defendant may be convicted as a conspirator even
19 though he may have played only a minor part in the
20 conspiracy.

21 This brings us to the third essential element,
22 namely, whether the object of the conspiracy was to
23 bring into the United States a prohibited controlled
24 substance.

25 Now, if you find beyond a reasonable doubt that

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2 the substance contained in the several plastic bags
3 admitted into evidence as Government exhibits is in
4 fact hashish oil, then I instruct you as a matter of
5 law that the substance would be a controlled substance
6 within the meaning of the Drug Act, the importation of
7 which is prohibited by law.

8 This brings us to the fourth element, the
9 commission of overt act in furtherance of the conspiracy
10 charged. You will recall that the indictment in
11 Count One alleges the overt act that on or about
12 April 10th, 1976, Covert and the defendant traveled
13 together from John F. Kennedy Airport, Queens, New York,
14 to India, and then on April 30th, 1976, they returned
15 together from India. Although the gist of the offense
16 of conspiracy is the unlawful agreement between two
17 or more individuals, nonetheless, you will have to
18 find a reasonable doubt that defendant's travel between
19 New York and India was in furtherance of an existing
20 conspiracy and not an unrelated individual act.

21 To sum up with respect to Count One, as the
22 evidence stands in this case, in order to find a
23 conspiracy, you must find beyond a reasonable doubt
24 that the defendant on trial and Brad Colbert, the
25 other alleged co-conspirator, wilfully conspired

1
2 or agreed that they would import hashish oil into
3 the United States concealed in such a manner as to
4 evade discovery by the Customs Authorities. If you
5 do not find that there was such an agreement or
6 understanding, then you cannot find that a conspiracy
7 existed.

8 Whether a defendant knowingly and intentionally
9 participated in the alleged conspiracy presents an
10 issue of fact. Proof of the requisite knowledge and
11 intent on the part of an alleged conspirator need not
12 be made by direct evidence. By direct evidence is
13 meant the testimony of a person who claims to have
14 knowledge derived through the censors, for example,
15 an eye witness.

16 In this case, however, it is the contention of
17 the Government that to the testimony of the alleged
18 co-conspirator, Brad Colbert, it has provided you
19 with direct evidence of the existence of the conspiracy.

20 However, the existence of a conspiracy and a
21 defendant's participation in it may be shown by
22 circumstantial evidence, by which we mean the existence
23 of the facts and circumstances from which the existence
24 of other facts and circumstances may reasonably be
25 inferred.

1
2 As I have said, exclusive language or words
3 are not required to indicate assent or attachment to
4 a conspiracy. The essence of the conspiracy is the
5 common plan or design. In determining whether there
6 has been an unlawful agreement, you may judge acts
7 and conduct of the alleged co-conspirators which are
8 done to carry out an apparent criminal purpose. These
9 include conversations and discussions among them to
10 that end. If you find circumstances of secrecy, or
11 attempts to conceal the true nature of a transaction,
12 these may be considered by you as circumstantial
13 evidence of criminal intent.

14 I emphasize again, however, that mere association
15 of the defendant with an alleged conspirator does not
16 establish his participation in a conspiracy, if you
17 find one did exist, nor is knowledge of illegal acts
18 of others sufficient.

19 The mere fact of an association or a friendship
20 between a defendant and an alleged co-conspirator,
21 by itself, would not be sufficient to establish that
22 defendant's participation in the conspiracy.

23 And as I said before, if one acts in a way
24 which furthers the conspiracy but has no knowledge of
25 it, he does not thereby become a participant.

1
2 What is necessary, and I emphasize it again,
3 is that you find beyond a reasonable doubt from the
4 evidence, that the defendant participated in the
5 conspiracy with a knowledge of at least some of
6 its purposes and with intent to aid the accomplishment
7 of its unlawful ends. A single act may be enough to
8 draw a defendant within the scope of a conspiracy
9 provided you are convinced beyond a reasonable doubt
10 that the defendant knew of the conspiracy and
11 associated himself with it.

12 Now let us turn to Count Two of the indictment,
13 which charges the defendant on trial with knowingly
14 and intentionally importing into the United States
15 from India a quantity of hashish oil, a Schedule One
16 controlled substance, in violation of the Federal
17 Drug Act.

18 (Continued on next page)

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1 The importation is alleged in Count Two to have
2 occurred on or about April 30, 1976, at John F. Kennedy
3 International Airport.
4

5 Before the defendant on trial may be convicted
6 on the charge in Count Two, the Government must
7 establish beyond a reasonable doubt the following
8 essential elements:

9 First: That on or about April 30, 1976, a
10 quantity of hashish oil was brought into the United
11 States concealed in the luggage carried by Colbert.

12 Second: That the defendant on trial knew that
13 the hashish oil was being illegally imported by
14 Colbert and that the defendant knowingly and intentional
15 ly aided and abetted its importation.

16 I have already explained the meaning of "importa-
17 tion" to you, and that to act knowingly is to do so
18 voluntarily and intentionally and not because of mistake
19 or accident or other innocent reasons. I have also
20 explained that to act intentionally means to do so
21 with specific intent to do something the law forbids,
22 or with specific intent to fail to do something the
23 law requires to be done; that is to say, to act or
24 participate with the bad purpose either to disobey
25 or to disregard the law.

1
2 There is evidence in this case that on April 30,
3 1976, hashish oil was found in a suitcase carried by
4 Colbert as he arrived from India on that date. You may
5 wonder why the defendant on trial is charged with
6 that offense. The answer to that question is found in
7 the United States Criminal Statute, known as the
8 "aiding and abetting statute", on which the Government
9 relies in charging the defendant on trial under Count
10 Two. That statute, Section 2 of Title 18, United
11 States Code, reads as follows:

12 "(a) Whoever commits an offense against the
13 United States or aids, abets, counsels, commands,
14 induces or procures its commission, is punishable as
15 a principal." That is to say, punishable in the same
16 way as the person who did the thing.

17 "(b) Whoever wilfully causes an act to be done
18 which is directly performed by him or another would be
19 an offense against the United States, is punishable
20 as a principal." That is saying it all over again
21 in different words.

22 Under the foregoing statute, it is not necessary
23 for the Government to show that a defendant personally
24 committed the crime charged. A person who aids and
25 abets another person to commit an offense is just as

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2 guilty of the offense as if he himself committed every
3 act related to it.

4 Accordingly, you may find the defendant on trial
5 guilty of the substantive offense if you find beyond
6 a reasonable doubt, as the Government charges, that
7 Colbert committed the offense and that the defendant
8 aided and abetted him.

9 In order to find that the defendant aided and
10 abetted, you must be satisfied beyond a reasonable
11 doubt that he in some way knowingly associated himself
12 with a criminal venture in a meaningful way; that he
13 knowingly participated in it as something he wished
14 to bring about, and by some action to make it succeed --
15 that he had a stake in its outcome.

16 In other words, if a person, fully aware of what
17 he is doing, plays a significant role in furthering
18 a transaction prohibited by law, he is an aider and
19 abettor, and as such, he is equally guilty with the
20 person who directly performed the illegal acts which
21 constitute the crime.

22 One final word on the subject of aiding and
23 abetting -- the mere presence of a defendant at the
24 place where the crime may have been committed or planned,
25 or where events which may be part of a conspiracy may

1
2 have transpired, is not a sufficient basis to find
3 that such a defendant aided and abetted the commission
4 of a crime or knowingly participated in the conspiracy
5 and intended to further its aims. The law requires
6 proof beyond a reasonable doubt that a defendant knowing-
7 ly played a part as aider and abettor. Mere knowledge
8 or association does not make out the offense of aiding
9 and abetting. In other words, mere knowledge or
10 association is not enough.

11 Now let us turn to Count Three in the indict-
12 ment which charges the defendant on trial with knowing-
13 ly and intentionally possession with intent to
14 distribute a quantity of hashish oil at John F. Kennedy
15 International Airport on April 30, 1976.

16 Let me explain that these are set forth in
17 separate counts because possessing a controlled substance
18 is a crime and importing it is a separate crime.

19 So, the Government spells them out in separate
20 counts.

21 Now, returning to Count Three, the possession
22 count, before the defendant may be convicted on the
23 charge in Count Three, the Government must establish
24 beyond a reasonable doubt the following essential
25 elements:

1
2 First: That on or about April 30, 1976, Colbert
3 had in his possession, knowingly and intentionally,
4 a quantity of hashish oil with intent to distribute
5 it.

6 Second: That the defendant knowingly and
7 intentionally aided and abetted Colbert in that
8 possession with such intent.

9 Again, as in the case of the charge in Count Two,
10 the evidence tends to show that it was Colbert alone
11 who arrived at Kennedy Airport on April 30th, 1976,
12 with a quantity of hashish oil concealed in the suit-
13 case he was carrying. Again, the Government relies
14 on the aiding and abetting statute in charging the
15 defendant on trial with the possession of that quantity
16 of hashish oil with the intent to distribute it. The
17 same aiding and abetting principles apply to the
18 charge in Count Three, as I have explained to you with
19 respect to Count Two.

20 There are some additional terms, however, which
21 require some explanation.

22 The term, "possession" has two meanings in law:
23 Actual possession and constructive possession.

24 Possession is actual when a person has a thing
25 in his manual or physical control. As the Government

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2 alleges when the hashish oil was in that particular
3 suitcase when Colbert was carrying it, he had it in
4 his physical possession and manual control.

5 Possession is constructive when a person, al-
6 though not having an article in his actual possession,
7 nevertheless has the power to control its disposition,
8 that is, by directing its transfer to someone else,
9 setting the price for its sale, and so forth. So,
10 if you find from the evidence beyond a reasonable
11 doubt that the defendant on trial had some relation-
12 ship to the hashish oil in the suitcase that Colbert
13 was carrying and that he possessed some power or
14 dominion or control over that particular hashish oil
15 so that he could direct it to be sold to someone or
16 fix the price for sale and so forth, if you are
17 satisfied that the evidence establishes that then you
18 may find he was in constructive possession of that
19 particular hashish oil.

20 Now, the term, "intent to distribute" simply
21 means having the intention of transferring or selling
22 the hashish oil at some point to someone else.

23 Again, you will have to decide whether the
24 defendant on trial knowingly and intentionally aided
25 and abetted Colbert in his possession of the hashish oil

1 on April 30, 1976, with intent to distribute it. If
2 so, then under the aiding and abetting statute, the
3 defendant on trial may be found guilty as a principal,
4 if you are satisfied by the proof beyond a reasonable
5 doubt.
6

7 Before you may find the defendant guilty of
8 possession of the hashish oil, you must find beyond
9 a reasonable doubt that he had knowledge of its presence
10 in the suitcase Colbert was carrying and that he
11 exercised some form of dominion and control over it
12 and intended to exercise such control.

13 A defendant may be proven guilty, as I have
14 said before, by either direct or circumstantial
15 evidence. The law makes no distinction as to the
16 weight to be given to either direct or circumstantial
17 evidence. Circumstantial evidence, if believed, is
18 of no less value than direct evidence: for in either
19 case you must be convinced, beyond a reasonable doubt,
20 of the guilt of the defendant. In this case the
21 Government relies upon both direct and circumstantial
22 evidence.

23 (Continued on next page)
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25

Now, it is obvious, I am sure, to you, that as to the counts, other than the first count of conspiracy, the critical question is whether the defendant on trial knew that there was hashish oil in the suitcase that Colbert was carrying and that he knew that Colbert was bringing and importing that substance into the United States since both that knowledge and that element of importation is essential to each of those two counts.

He could not import it unless it was possessed and he could not possess it or import it if there were not knowledge -- I am speaking now of the defendant -- on his part that it was there.

You may not find the defendant guilty on Counts Two and Three unless you find, as I said, beyond a reasonable doubt, that he knew the hashish oil was being imported into the country. The fact of knowledge as I have indicated may be established by direct or circumstantial evidence just as any other fact in the case.

The defendant, I might point out, contends through his counsel that the evidence is deficient in respect of his active participation in any of the transactions in which Colbert was found to have been implicated and he assails the testimony of Colbert as particularly

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2 unbelievable.

3 Whether the defendant knowingly and intentionally
4 participated with Colbert in the substantive offenses
5 alleged or with him in the claimed conspiracy, presents
6 issues of fact and questions of credibility. Clearly,
7 this concerns what is in a man's mind.

8 Medical science has not yet devised an instrument
9 whereby we can go back to the time of the occurrence
10 of the events and determine what then was a person's
11 intent or knowledge. These may only be determined
12 from a person's acts, his conduct and surrounding
13 circumstances and such inferences as may reasonably
14 be drawn therefrom.

15 What we mean by drawing inferences is very
16 simple.

17 You all remember the familiar tale of Robinson
18 Crusoe alone on his island until the day he walked on
19 the beach and saw a human footprint in the sand. He
20 immediately inferred from that that there was someone
21 else there too, you see. That is what we mean by the
22 drawing of inferences. He knew that such a footprint
23 could only be made by a human being that was alive,
24 at least, at the time he made it and Crusoe immediately
25 jumped to the logical conclusion or inference that

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2 there was someone else there on the island because
3 it was not his own footprint. So, that is what we
4 mean. It is something we see with our own eyes or
5 establish in some other way.

6 We have no way, as I said, of looking directly
7 into a person's mind. All we can do is consider
8 whether he did certain things or said certain things
9 which permit our minds logically to infer other facts.

10 For instance, here there was some evidence
11 intending to show that the defendant engaged in another
12 transaction similar to that charged in the indictment.
13 Now, let me point out to you the fact that the defendant
14 may have committed another offense at sometime is not
15 any evidence or proof whatever that at a different
16 time the accused committed the offenses charged in the
17 indictment even though both offenses are of a like
18 nature. Evidence as to an alleged prior offense of a
19 like nature may not be considered by the jury in
20 determining whether the accused did the act charged
21 in the indictment. Nor may such evidence be considered
22 for any other purpose whatever, unless the jury first
23 finds that other evidence in the case, standing alone,
24 establishes beyond a reasonable doubt, that the
25 accused did the acts charged in the indictment, leaving

1
2 aside only the question of whether the accused did
3 knowingly, intentionally and wilfully.

4 If you should find beyond a reasonable doubt
5 from the evidence in the case, that the accused, the
6 defendant on trial, did the act charged in the indict-
7 ment, then you may consider the evidence as to the
8 alleged earlier conduct of a like nature in determining
9 the state of his mind, his knowledge, his intent or
10 wilfullness with respect to the act which is charged
11 in the indictment. And where all the elements of an
12 alleged earlier offense of a like nature are established
13 by evidence which is clear and conclusive, the jury
14 may, but it is not obliged to, draw the inference and
15 find that in doing the act charged in the indictment
16 the accused acted wilfully, knowingly and with specific
17 intent, and not because of mistake or accident or other
18 innocent reason.

19 From what I said thus far it must be apparent
20 to you that the Government and defense are in sharp
21 divergence and critical issues of fact and credibility
22 are raised. You are called upon to decide the facts
23 in issue here. How do you decide this?

24 Now, I think you understand why at the start
25 of the trial I suggested it would be desirable and

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2 important for you not only to listen, but to look at
3 the witnesses as they testified. Your determination
4 of the issue of credibility very largely must depend
5 upon the impression that a witness made upon you as
6 to whether or not he was telling the truth or giving
7 you an accurate version of what occurred. I often
8 say to jurors, when you walk into the courtroom and
9 sit in the jury box, while the trial is going on and
10 later when you are deliberating in the jury room, you
11 bring with you your common sense, good judgment and
12 your experience. You decide whether or not a witness
13 was straightforward and truthful: whether he attempted
14 to conceal anything: whether he has a motive to testify
15 falsely: whether there is any reason why he might
16 color his testimony.

17 In other words, what you try to do, to use the
18 vernacular, to size a person up just as you would do,
19 as I said before, in any important matter where you
20 were undertaking to determine whether or not a person
21 is truthful, candid and straightforward.

22 In passing upon the credibility of a witness,
23 you may also take into account inconsistencies or
24 contradictions as to material matters in his own
25 testimony, or any conflict with that of another witness.

1
2 A witness, however, may be inaccurate, contradict-
3 ory or even untruthful in some respects, and yet be
4 entirely credible in the essentials of his testimony.

5 The ultimate question for you to decide in
6 passing upon credibility is, did the witness tell the
7 truth here before you as to the essential matters.

8 Aside from the general considerations regarding
9 the evaluation of testimony I have just mentioned,
10 there are some special witness instructions required
11 in this case.

12 As you are aware the Government contends that
13 through the testimony of the witness, Brad Colbert,
14 it has, in addition to circumstantial evidence offered
15 direct proof of conspiracy. Colbert is named in the
16 indictment as one of the co-conspirators. By his own
17 admission on the stand he must be regarded as a
18 perpetrator of the offense charged against the defendant
19 on trial.

20 An accomplice is one who wilfully associates
21 himself with the commission of a crime. The law does
22 not prohibit the use of accomplice testimony and whether
23 you approve or disapprove of its use should not enter
24 into your consideration of the case. In certain types
25 of cases the Government is, of necessity, frequently

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2 compelled to rely upon the testimony of an accomplice.
3 Otherwise it would be difficult to detect or prosecute
4 some wrongdoers and that is particularly true with
5 conspiracy cases.

6 Often the Government has no choice in the
7 matter. It must take witnesses to transactions as
8 they are. There is no requirement in the Federal
9 Court that the testimony of an accomplice be corroborated.
10 A conviction may rest on the uncorroborated testimony
11 of such a witness, if he is found credible and reliable.
12 However, the testimony of such a witness should be
13 viewed with great caution and scrutinized very care-
14 fully. Nevertheless, it does not follow, because a
15 person has acted or been a participant in a crime or
16 is an accomplice that he is not capable of giving a
17 truthful version of what occurred. You should ask
18 yourselves these questions:

19 Did Colbert give false testimony or color his
20 testimony contrary to fact because he has not been
21 prosecuted on the remaining charges in the indictment
22 or because he believes that his cooperation may result
23 in more lenient treatment. If you find his testimony
24 was deliberately untruthful, you should unhesitatingly
25 reject it. On the other hand, if upon a cautious and

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2 careful examination you are satisfied that he has
3 given a truthful version of the essential events, be-
4 yond a reasonable doubt, there is no reason why you
5 should not accept it.

6 The defendant, Philip Rosati has not testified
7 in this case. That is his absolute right and in no
8 respect may be considered by you as any evidence against
9 him or as a basis for any presumption or inference un-
10 favorable to him. You must not permit the fact to
11 weigh in the slightest degree against him, nor should
12 it enter into your deliberations or discussions.

13 The evidence in the case consists of the
14 testimony of all witnesses except that which I have
15 instructed you to disregard and all exhibits received
16 in evidence. All evidence, whether or not I have
17 referred to it in these instructions or counsel has
18 mentioned it in their summations, is important and
19 must be considered by you. If perchance any reference
20 to testimony is not in agreement with your recollection,
21 and I have stated this before, you are to disregard
22 such references and I emphasize this as strongly as I
23 can. Always, it is your recollection and yours alone
24 that governs and you must unhesitatingly reject any
25 statement as to a fact, whether made by the Court or

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2 counsel which does not coincide with your own re-
3 collection of the evidence.

4 During the course of the trial the attorneys
5 at various times have objected to certain questions
6 and moved to strike answers and have taken other
7 procedural positions before you. These are matters
8 of technical procedure that are the proper concern of
9 attorneys and should not concern you. I instruct you
10 that you are not to draw any inference from the fact
11 that an attorney may have made objections and motions
12 before you during the trial.

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2 The Government, in order to prevail, must prove
3 the essential elements of the crimes charged by the
4 required degree of proof as already explained in these
5 instructions. If it is successful, your verdict should
6 be guilty. If it fails your verdict should be not
7 guilty.

8 However, if you find the defendant guilty of
9 conspiracy, you must find that he was engaged in the
10 conspiracy with at least one other person since I have
11 told you a conspiracy requires an agreement or under-
12 standing between at least two persons.

13 Your verdict must be unanimous as to each count
14 in the indictment. Your function is to weigh the
15 evidence in the case and determine the guilt or
16 innocence of the defendant solely upon the basis of
17 such evidence and these instructions.

18 Under your oath as jurors, as I have mentioned
19 previously, you cannot allow consideration of the
20 sentence which may be imposed upon a defendant if he
21 is convicted to enter into your deliberations or to
22 influence your verdict in any way.

23 Your duty is to decide the case solely and
24 only upon the evidence and in the event of a conviction
25 the duty of imposing sentence rests solely with the

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2 Court.

3 Each juror is entitled to his or her own opinion
4 but each should, however, exchange views with his
5 fellow juror. That is the very purpose of jury
6 deliberation, to discuss and to consider the evidence;
7 to listen to the arguments of fellow jurors; to present
8 your individual views; to consult with one another;
9 and to reach an agreement based solely and wholly upon
10 the evidence, if you can do so without violence to
11 your own individual judgment.

12 Each one of you must decide the case for himself
13 or herself after consideration with his or her fellow
14 jurors. But you should not hesitate to change an
15 opinion, which, after discussion with your fellow
16 jurors, appears to be erroneous.

17 However, if after carefully considering all the
18 evidence, and the arguments of your fellow jurors, you
19 entertain a conscientious view that differs from others,
20 you are not to yield your judgment simply because you
21 are outnumbered or outweighed.

22 Your final verdict must reflect your conscientious
23 view as to how the issue should be decided. The charge
24 here, as I have said, is a serious one. The just
25 determination of this case is important to the public

and it is equally important to this defendant.

Under your oath as jurors, you must decide the case without fear or favor and solely as I have stated a number of times, solely in accordance with the evidence and the law.

If the Government has failed to carry its burden as to the defendant, your sworn duty is to acquit. If it has carried its burden as to the defendant, you must not refrain from your sworn duty, you must convict.

Now, members of the jury, to simplify your task I prepared a special form of verdict in which each count is summarized and the word, "guilty" or "not guilty" appears against which you may make a check and which you may follow as your outline during your deliberations.

I am going to hand the original to the floor-woman, Juror No. 1, who tradition, and I have extra copies for each one of you to have in the jury room.

I am going to let you retire for a few minutes while I give counsel the opportunity to inform me out of your presence, whether I have misspoken anything in the course of these instructions or omitted anything that should have been said. Then, I will turn the papers, the special verdict forms over to you and if you wish you may have a copy of the indictment in

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2 the jury room with you also.

3 There have been many exhibits admitted here.
4 The testimony that has been given in court has been
5 transcribed and is here. You may have any or all of
6 those exhibits in the jury room if you wish.

7 My recommendation from experience is this --
8 that you have heard this testimony at length, you have
9 heard the summations of counsel, you have heard my
10 instructions. You have formed some impressions. I
11 suggest that you begin your deliberations to determine
12 where there is disagreement on some point that requires
13 let us say, looking at a particular exhibit or perhaps
14 hearing a particular snatch of testimony, if I may use
15 the word "snatch" meaning not a whole chapter or book.
16 It is not helpful to have a particular witness'
17 testimony read in full. But, when a particular point
18 comes up which requires resolving call for it and we
19 will give it to you. Write a note to the Court. Your
20 Foreman can serve ~~as~~ as official recorder of notes and
21 they will be brought to the Court and I will then
22 convene counsel who will discuss an answer to your
23 question if any.

24 You may have, as I have indicated, testimony
25 read back.

1
2 If there is any doubt about the Court's
3 instructions you may ask the Court to read portions
4 of the instructions back to you.

5 I have said a great deal already. At this
6 point I will let you retire while I give counsel
7 a chance to talk.

8 THE CLERK: Shall I swear in the Marshal?

9 THE COURT: Yes.

10 (Whereupon, a United States Deputy Marshal
11 was duly sworn by the Clerk of the Court at
12 4:50 P.M.)

13 THE COURT: Marshal, you are in charge.

14 (Jury excused.)

15 (The following occurred in the absence of the
16 jury.)

17 THE COURT: All right, gentlemen.

18 MR. RUDOLF: I have three points that I'd like
19 to raise.

20 THE COURT: All right.

21 MR. RUDOLF: The first one is that somewhere
22 in the middle of your charge you indicated -- I
23 believe it was sort of extemporaneous -- that the
24 critical question for the jury to determine with
25 respect to Counts Two and Three was whether or not
the defendant knew that Colbert had the hashish oil.

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2 I know your Honor previously had instructed
3 them that mere knowledge wasn't enough but you seemed,
4 at least to me, to back off that somewhat in your
5 comments about the critical question being knowledge
6 and I thought that might have created a faulty
7 impression and I would respectfully take an exception
8 to that portion of the charge.

9 The second point was that --

10 THE COURT: Well, I think you are referring
11 to that portion where I said before you may find the
12 defendant guilty of the possession of the hashish
13 oil you must find beyond a reasonable doubt that he
14 had knowledge of its presence in the suitcase Colbert
15 was carrying and that he exercised some form of
16 dominion and control over it --

17 MR. RUDOLF: No, your Honor.

18 There was a point in time when I got the very
19 definite sense you were not referring to notes but
20 merely expounding on a certain point to the jury and
21 you indicated that the critical question was knowledge
22 and you didn't really elaborate on the other elements
23 but sort of focused on the knowledge.

24 I got the sense it was extemporaneous --

25 THE COURT: No, I was reading.

1
2 Now, it is obvious that as to the counts, other
3 than the first count of conspiracy, the critical
4 question is whether the defendant on trial knew that
5 the substance in the suitcase was hashish oil.
6 That element of actual knowledge that Colbert was
7 bringing and importing that substance into the United
8 States is an essential element of each of the offenses
9 charged, both as to importing and as to possession.

10 That's how I thought I read it. Knowledge is an
11 essential element. He couldn't be guilty if he didn't
12 have knowledge.

13 MR. RUDOLF: It's just the impression left with
14 me.

15 MR. THOMPSON: I think it is to distinguish
16 between the aider and abettor elements and the
17 constructive possession aspect.

18 THE COURT: Well, your exception is reserved
19 for the record.

20 MR. RUDOLF: Thank you.

21 I have two other exceptions.

22 I was not under the impression -- and I guess
23 I was operating under a faulty impression -- that your
24 Honor decided to charge on prior similar acts.

25 I thought your Honor had indicated that you

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2 didn't feel that this was really a case involving
3 prior similar acts.

4 THE COURT: Except Mr. Thompson persuaded me
5 there was testimony about the hashish in tubular or
6 circular form that came over in the lamp. That was
7 part of the discussion, as I remember it, that led up
8 to the understanding.

9 So, since an instruction -- a party is entitled
10 to an instruction where there is evidence to support
11 it, I felt obliged to give it.

12 MR. RUDOLF: I didn't understand your Honor
13 actually ruled on that.

14 My point is, when Mr. Thompson and I discussed
15 with the Court relevance of those acts we talked
16 about the fact that they had been relevant only --
17 and Mr. Thompson was offering them -- only as part of
18 the course of inducement of the conspiracy.

19 It seems to me that under the language of your
20 Honor's charge and what Mr. Thompson is now arguing,
21 all of a sudden that theory is sort of put by the
22 wayside, so to speak, and we are showing prior importa-
23 tions and it does not go to the inducement but what
24 was in his mind when he went to India and I think it
25 confuses things more than it clears them up.

1
2 THE COURT: Well, I don't know because the
3 discussion about inducement was with the Court side
4 bar as I recall --

5 MR. THOMPSON: That's right --

6 THE COURT: -- and I don't believe that the
7 jury is confused by what I said because what was said
8 indicated that in determining whether or not there was
9 a conspiracy to import or an actual importation or
10 possession in connection with that it was also essential
11 to prove the element of intent and knowledge and that
12 this other so-called prior testimony was limited, more
13 limited actually, by instructions than I think would
14 have been the case under the inducement theory.

15 In other words, the jury could not convict the
16 defendant simply because of that prior testimony.
17 It could only use that prior testimony if from other
18 evidence it found he had something to do with this --
19 whether he did it knowingly and intentionally.

20 MR. RUDOLF: I understand what your Honor is
21 saying. I would like to preserve my exception for the
22 record.

23 THE COURT: Of course.

24 MR. RUDOLF: I did not feel the Court instructed
25 the jury sufficiently on the danger of accomplice

1 testimony.

2
3 Your Honor gave a fairly lengthy discussion of
4 accomplice testimony but the only sentence which I
5 picked up on -- perhaps I wasn't listening accurately --
6 but the only sentence I picked up on which warned of
7 the danger was that you indicated that it should be
8 weighed with great caution and scrutinized carefully.

9 That was one sentence in a long paragraph on
10 accomplice testimony and then your Honor further
11 stated that it cannot be disregarded simply because it
12 is an accomplice.

13 It is my feeling that the jury wasn't given
14 sufficient warning of the danger of accomplice testimony
15 and I specifically request that my charge, based in
16 part, at least, on a Judge Weinstein charge given several
17 years ago, be read to the jury on that issue.

18 THE COURT: Well, I did read what you suggested
19 but I believe that in an effort to travel, what I call
20 the middle road and the language I customarily give,
21 strikes me as being more fair to both sides.

22 Obviously, each side wants to try to make it lean
23 a little his way. The Government is also guilty of
24 that.

25 So, I try to keep it down the middle and I can

1
2 assure you there have been occasions and apparently
3 it has been more effective for the defense than the
4 Government --

5 MR. RUDOLF: It happens on occasion --

6 THE COURT: It's been tested by the polls.

7 Well, I am going to let them deliberate say,
8 until about 5:30.

9 MR. THOMPSON: Unless I am out of line or under
10 a misapprehension I understood that the jury would be
11 recalled --

12 THE COURT: Oh, no.

13 Marshal, tell them to go ahead.

14 MR. THOMPSON: I thought they would be provided
15 with a work sheet --

16 THE COURT: Yes.

17 Give them that.

18 DEPUTY MARSHAL: Yes.

19 THE COURT: It is my feeling that we let them
20 know that they have the option to stay or leave.

21 MR. THOMPSON: Counsel and I have discussed
22 it and we are amenable and agreeable to remaining
23 sometime this evening if they appear to be making
24 progress.

25 THE COURT: I give them the option in these

1
2 terms: I say, if you believe by staying you can
3 conclude the matter one way or the other, fine, but,
4 if on the other hand, you have not yet reached a
5 point in the deliberations where you think you can,
6 then I want you to understand that you are free to
7 knock off tonight and return tomorrow. That's the
8 way I do it.

9 (Recess taken.)

10 (Continued on next page)
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(After recess.)

(Time noted: 5:30 p.m.)

(Jury not present.)

THE COURT: Have you gentlemen been informed of the first note?

MR. RUDOLF: Yes.

As Mr. Thompson remarked, he was glad you would have to do that and not us.

MR. THOMPSON: Shall we draw the inference from the use of your word "first" that there is more than one note?

THE COURT: Oh, no, no. I am saying this is probably the first of many to come.

I think in view of the hour I will pop the question to them so bring them in.

MR. RUDOLF: Very well.

THE CLERK: Jury note marked Court Exhibit 1.

THE COURT: What they really want to know is the difference between conspiracy and the substantive count.

MR. THOMPSON: Maybe the similarity of language Judge -- the absence of the words.

(Jury entered jury box.)

THE COURT: Good evening, members of the jury.

I have your first note and I would answer your

1 question this way:

2 Count One, the conspiracy, sets forth a separate
3 and distinct offense from the two other counts which
4 we call substantive counts.

5 In other words, the act, if one can call it an
6 act, of agreeing with another person to do something
7 to accomplish an unlawful end or objective, that is to
8 violate the law, or to even accomplish a lawful end
9 by using unlawful means to do it, the very agreement,
10 is itself a crime. That is the crime of conspiracy.

11 The gist of the crime is a decision of two or
12 more persons to embark upon an unlawful enterprise,
13 an agreement in and of itself followed by an overt act,
14 that is, doing something to put the agreement into
15 operation.

16 An overt act means something that is outside,
17 out in the open and it may be very innocent.

18 For example, if a number of people sit down
19 around a table, let us say, while playing poker and
20 one of them says, how about us agreeing about robbing
21 the bank down the block and talk about it and talk
22 about it and nothing is done by way of an overt act
23 there is no crime of conspiracy despite all the talk
24 and discussion.

25 However, if one of them says, tomorrow morning

1 I will steal a car for the getaway car or I will
2 borrow my friend Joe's car -- a perfectly lawful act
3 -- let's put it that way -- so that we will have the
4 getaway car, if he actually does that and the others
5 understand that, that makes out the crime of conspiracy
6 to rob a bank. It is very little but it is the doing
7 of the overt act that makes the agreement criminal.

8 Now, the other counts, Two and Three, which
9 deal with importing, acts of importing and acts of
10 possession are called substantive counts and what is
11 important there, as I told you, is the acts themselves.

12 The acts of importing and the acts of possessing
13 are separate and distinct offenses under the Federal
14 Drug Act and you must be satisfied beyond a reasonable
15 doubt as to the several elements of those crimes that
16 I have explained to you but also keeping in mind that
17 you can be an aider and abetter in connection with
18 substantive acts as long as you find beyond a reason-
19 able doubt that the person actually -- who is charged
20 with aiding and abetting -- actually did something to
21 associate himself with what was being done intending
22 to help it along, to assist it to succeed. That's
23 it in a nutshell.

24 Now, I'm going to say, in view of the hour --
25 I don't know where you stand at the moment and it is

1 not my desire to rush you in your deliberations --
2 but I want you to know that you are free, if you wish,
3 to continue deliberations or you are free to decide
4 to recess now and come back tomorrow morning.

5 Do you want to talk about that and make up your
6 minds as to what you wish to do?

7 JUROR NO. 1: They wish to talk about it first.

8 THE COURT: You want to talk about it first?

9 JUROR NO. 1: Yes.

10 THE COURT: All right. You may go outside and
11 we will await your decision.

12 (Jury excused.)

13 (Pause.)

14 (Jury enters jury room.)

15 JUROR NO. 1: The jury has decided to wait until
16 tomorrow.

17 THE COURT: Does your absent confrere agree
18 with that?

19 JUROR NO. 4: He agrees.

20 JUROR NO. 2: He most probably does.

21 (Whereupon Juror No: 5 entered the courtroom.)

22 THE COURT: I understand you are unanimous
23 in agreeing to come back tomorrow morning?

24 JUROR NO. 5: Yes.

25 THE COURT: 10:00 O'clock, is that agreeable?

(Jury indicating the affirmative.)

THE COURT: Remember, incidentally, you may do it earlier if you wish. That is only a suggestion but if it is inconvenient to be here at say, 9:30 --- well, I'll leave that up to you. Does anybody feel that it is an inconvenience?

JUROR NO. 8: 9:30 will be hard for me.

THE COURT: All right. Since you cannot do any deliberating until all twelve of you are there --- no deliberations until all twelve are assembled --- and at that time the Marshal will provide you again with such papers as you have in there, the indictment and the forms.

Now, this is an especially critical time and you should not discuss this case with anybody at home. You are now at a critical stage and it is imperative that you keep anything out of your minds as to the case except what you heard with regard to the evidence here.

I will keep my fingers crossed that all twelve stay healthy.

(Jury excused.)

(Court adjourned to November 17th, 1976.)

* * * *

1 (The following occurred in the absence of the
2 jury.)

3 THE CLERK: Jury note marked Court's Exhibit
4 two.

5 (Document referred to is received and
6 marked Court's Exhibit Number two.)

7 THE CLERK: Jury note marked Court's Exhibit
8 3.

9 (Document referred to is received and
10 marked Court's Exhibit 3.)

11 THE COURT: Good morning.

12 MR. RUDOLF: Good morning.

13 MR. THOMPSON: Good morning, your Honor.

14 THE COURT: Have you had an opportunity to look
15 at the testimony that they asked for?

16 MR. RUDOLF: Yes, your Honor.

17 MR. THOMPSON: Yes, Judge.

18 THE COURT: Was any reference to the testimony?

19 MR. RUDOLF: Yes, on page 417 on my cross-
20 examination.

21 THE COURT: 417?

22 MR. RUDOLF: It is lines 14 through 22.

23 THE COURT: I see it.

24 Ok.

25 Now, you have seen this --

1 MR. RUDOLF: Clarification.

2 THE COURT: -- This clarification one, yes,
3 "Possession to intent to distribute is a question asked
4 by jurors".

5 MR. RUDOLF: I am not sure I understand--

6 THE COURT: I am not sure I understand it either.

7 Maybe I will ask them to please clarify it.

8 All right, bring them in.

9 (The jury thereupon returned to the courtroom
10 at 11:00 o'clock A.M.)

11 THE COURT: Good morning, members of the Jury,
12 I have your respective notes. And in the order in
13 which we received them, counsellor has agreed on the
14 scope of the testimony you requested regarding what
15 Agent Peoples had to say about the prior or previous
16 police record of Mr. Rosati. So the reporter will
17 read the portions in question to you.

18 (The reporter thereupon read from the cross-
19 examination of John Peoples at page 417, lines 14
20 through 22.)

21 THE COURT: All right. Now, your second note
22 asks for a clarification of the instruction which
23 the regard to the count charging possession with
24 intent to distribute. That is what you wanted to
25 hear?

1 Now, let me read what I had said and then we
2 will see whether that still leaves questions in your
3 mind.

4 I told you that Count three charges the defendant
5 with knowingly and intentionally possessing with intent
6 to distribute the quantity of hashish oil found in the
7 luggage at the airport on April 30th, 1976.

8 Now, the elements of that were, that is, which
9 the Government must establish beyond a reasonable doubt,
10 first, that on or about April 30th, Colbert had in his
11 possession knowingly and intentionally a quantity of
12 hashish oil with intent to distribute. And, second,
13 that the defendant Rosati knowingly and intentionally
14 aided and abetted Colbert in that possession with such
15 intent, that is to say, that Rosati also had some-
16 thing to do either as an aider or abetter or as a co-
17 conspirator, if you find that, with respect to the
18 hashish oil. And that his intent was to have that
19 oil under his dominion and control, even though possessed
20 by Colbert, because it was in the luggage that Colbert
21 was carrying, and that it was with the intent to
22 distribute it.

23 And I explained to you that the intent to
24 distribute simply means that you do not expect to use
25 it for your own personal use, but intend to sell it or

1 transfer it to somebody else.

2 Does that help any to answer your question?

3 JUROR NUMBER TWO: Yes.

4 JUROR NUMBER THREE: Yes.

5 (Jurors nod in the affirmative.)

6 THE COURT: All right, you may go back and resume.
7 your deliberations

8 (The following occurred in the absence of the
9 jury at 11:20 o'clock A.M.)

10 THE CLERK: Jury Note marked Court's Exhibit
11 four.

12 (Document referred to was received and marked
13 Court's Exhibit 4.)

14 THE COURT: "Rosati knew that Colbert was going
15 to distribute, is that enough for Count 3?"

16 They want me to decide the case for them.

17 MR. RUDOLF: Your Honor, I think this goes back
18 to the problem that I raised yesterday at the conclusion
19 of your charge with respect to the emphasis I
20 thought that you had placed on knowledge as the
21 critical question. And I think that a knowing spectator
22 charge out of Devitt and Blackmer would be
23 appropriate at this point. I mean mere knowledge
24 clearly is not sufficient. I think a charge on mere
25 knowledge and being a known spectator, or something

1 along those lines, would clearly be appropriate.

2 MR. THOMPSON: I would submit, your Honor, that
3 we are talking about page 514 of your charge in the
4 record wherein you are dealing with the aider and
5 abetter on the substantive counts. And I think it
6 would be appropriate, notwithstanding what Mr. Rudolf
7 has asked for in terms of the knowing spectator charge,
8 that if that is to occur that is the aider and abetter
9 delineation be reiterated.

10 MR. RUDOLF: I have no objection to reiterating
11 the aider and abetter charge.

12 THE COURT: Well, it was my own belief that
13 you are correct in saying that knowledge alone --
14 knowledge alone is not enough, -- that there must be
15 some other evidence of participation --

16 MR. RUDOLF: In an attempt to make it succeed.

17 THE COURT: -- In the attempt to make it
18 succeed, that is right.

19 That is what aiding and abetting is all about.

20 MR. THOMPSON: Judge, at the bottom of 514
21 in the charge where you had begun to discuss the
22 aider and abetter concept, you made a reference
23 in the last line to the events which may be part of
24 a conspiracy that has transpired is not a sufficient
25 basis to find -- I would suggest or submit at this

1 point perhaps a changing of the wording, may be part
2 of a distribution. rather than part of the conspiracy
3 since you were there talking about the substantiative
4 count.

5 MR. RUDOLF: Except that paragraph again talks
6 about presence as opposed to the presence even
7 coupled with knowledge. I mean their problem is
8 whether the knowledge by itself is enough. It seems
9 to me that is what their question is directed at,
10 not presence. Presence is not really in issue here.

11 MR. THOMPSON: You deal with the constructive
12 possession on page 517, second paragraph.

13 THE COURT: You see, I think what they are
14 concerned about here is entirely with the possession
15 count, Count three. They apparently -- I assume
16 they have gotten by --

17 MR. RUDOLF: Apparently.

18 THE COURT: And of course the aiding and abett-
19 ing charge was given with reference to Count two,
20 although I said to them that with respect to possess-
21 ion you also apply the same aiding and abetting
22 principle. So I think it would be fair to say that.
23 Somewhere in here I have it -- I have here mere
24 knowledge or association does not make out the
25 offense of aiding and abetting.

1 MR. RUDOLF: What page is that?

2 THE COURT: I don't think I have that volume
3 here, unless someone has it.

4 MR. THOMPSON: If you would like my copy,
5 Judge, it begins at page 513, I believe.

6 THE COURT: Well, 515 mere knowledge or
7 association does not make out the offense of aiding
8 and abetting. And then I will come to say that what
9 you must find is that the defendant -- what you must
10 find beyond a reasonable doubt -- is that in some
11 way he knowingly associated himself with a criminal
12 venture in a meaningful way, and that he knowingly
13 participated in it as something he wished to bring
14 about, and by some action to make it succeed.

15 MR. RUDOLF: That's fine with me.

16 My personal preference would be for you to read
17 that first and then to say mere presence or knowledge
18 is not sufficient rather than do it the other way
19 round. But that's just my personal preference --
20 if your Honor doesn't agree with that -- I wanted
21 the distinction.

22 THE COURT: I can put it this way, of course,
23 since jurors want to have these charges reduced to
24 terms if they can understand, and I would say that
25 it seems to me I would answer this by pointing out to

1 them that knowledge that someone is committing a
2 crime -- that knowledge on Rosati's part that Colbert
3 was committing a crime is not enough. That you must
4 find in addition to that knowledge, if you believe he
5 knew, that he had done something in conjunction with
6 Colbert's possession --

7 MR. RUDOLF: To help bring it about.

8 THE COURT: Help bring about the possession.

9 MR. RUDOLF: That is fine with me, your Honor.

10 MR. THOMPSON: Very well.

11 THE COURT: That's the practical way.

12 MR. RUDOLF: It's fine with me.

13 (The jury thereupon returned to the courtroom
14 at 11:27 o'clock.)

15 THE COURT: Members of the jury, have your
16 additional note relating to Count number three. Your
17 note reads:

18 "If Rosati knows that Colbert is going to
19 distribute is Rosati guilty on charge number three."

20 Well, I cannot render a verdict for you.
21 But I understand the intent of your question to be
22 some clarification with respect to what would be
23 necessary to find from the evidence in order to conclude
24 that the defendant was guilty of the possession count.
25 And you will recall I said that knowledge alone is not

1 enough -- knowledge alone is not enough -- you must
2 also find beyond a reasonable doubt from all the
3 evidence relating to these events that Rosati played
4 some part in Colbert's possession. Do you understand?
5 That he had -- and as I told you -- an aider and
6 abetter-- you must find beyond a reasonable doubt
7 that an aider and abetter knowingly associated himself
8 with a criminal venture in a meaningful way. That
9 he knowingly participated in it as something he wished
10 to bring about, and by some action , to make it succeed;
11 that he had a stake in its outcome. So knowledge alone,
12 to repeat, is not enough. You must be satisfied beyond
13 a reasonable doubt as to the evidence that Rosati
14 did something to make this venture take place, or
15 in the hope that it would succeed. Do you understand?
16 Is that clear now?

17 JUROR NUMBER THREE: Yes.

18 JUROR NUMBER ONE: Yes.

19 (Jurors nod in the affirmative.)

20 THE COURT: All right, will you resume your
21 deliberations now.

22 (The jury thereupon retired from the courtroom

23 11:30 o'clock A.M.)
24
25

CERTIFICATE OF SERVICE

May 10, 1977

I certify that a copy of this ~~brief~~ and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Ray S. B.